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No. 01-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ARCADIS GERAGHTY AND MILLER, INC.,

Petitioner,

v.

CONOCO INC.; CONDEA VISTA COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit err by construing CERCLA's statute of limitations so as to exempt from limitations a cause of action against a contractor that participated in environmental investigation of a contaminated site, such that the site-owners's lawsuit is never time-barred as a matter of law?

2. Did the Fifth Circuit err by extending CERCLA liability for "operators" of hazardous substance facilities to an environmental contractor whose contractual duties were limited to mere design and placement of groundwater monitoring wells at the direction of the facility's owner?

3. Did the Fifth Circuit err by extending CERCLA liability for parties who "arranged for disposal" of hazardous substances to an environmental contractor that made no arrangement with intent to dispose of hazardous substances that allegedly caused damage?

PARTIES TO THE PROCEEDING

All the parties in the United States Court of Appeals for the Fifth Circuit are identified in the caption, except that ARCADIS Geraghty & Miller, Inc. was formerly named Geraghty & Miller, Inc.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

ARCADIS Geraghty & Miller, Inc., is wholly owned by its parent company, ARCADIS, N.V.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 11

I. In Contrast to the Holdings of the Other Circuits, the Fifth Circuit Incorrectly Focused Only on Activities Conducted During G&M's Response Action Involvement Rather Than Looking at the Totality of On-Site Response Activity When Determining the Response Action That Triggered the CERCLA Section 113(g)(2) Statute of Limitations 14

Page

II. This Court Should Make Clear that "Operator" Liability Does Not Extend to Environmental Contractors that, Like G&M, Participated in Response Activities at an Already-Contaminated Site at the Direction of the Site Owner 20

III. This Court Should Decide Whether Intent Is an Element of Arranger Liability Because the Fifth Circuit Failed to Resolve the Issue Despite Its Dispositive Importance on Remand and the Clear Conflict of Circuit Court Decisions on the Issue 23

A. The Courts of Appeals Have Issued Conflicting Rulings on Whether CERCLA Requires Intent to Dispose as an Element of Arranger Liability.....25

B. The Fifth Circuit's Failure to Address the Issue of Whether Intent Is an Element of Arranger Liability, in Light of the Fact That the District Court Based Its Holding on Lack of Intent Leaves the District Court With Insufficient Direction 27

CONCLUSION 29

Appendix A ..... Ia

Appendix B 30a

Appendix C 32a

Page

Appendix D 48a

Appendix E 50a

TABLE OF AUTHORITIES

Page

CASES

ABB Indus. Sys., Inc. v. Prime Tech., Inc.,
120 F.3d 351 (2d Cir. 1997).....11

Amcast Indus. Corp. v. Detrex Corp.,
2 F.3d 746 (7th Cir. 1993) 14, 25-26

Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., 100 F.3d 792
(10th Cir. 1996).....8

Blasland, Bouck & Lee, Inc. v. City of North Miami,
96 F. Supp.2d 1375 (S.D. Fla. 2000) 22-23

Burlington Northern Railroad Co. v. Woods Industries, Inc., 815 F. Supp.
1384 (E.D. Wash. 1993) 28

Carter-Jones Lumber Co. v. Dixie Distrib. Co., 166 F.3d 840
(6th Cir. 1999).....25

Chatham Steel Corp. v. Brown,
858 F. Supp. 1130 (N.D. Fla. 1994).....26

Ekotech Site PRP Comm. v. Self,
932 F. Supp. 1328 (D. Utah 1996).....25

Exxon Corp. v. Hunt,
475 U.S. 355 (1986).....8, 11

Page

Ganton Technologies, Inc. v. Quadion Corp.,
834 F. Supp. 1018 (N.D. Ill. 1993) 23

Greene v. Product Mfg. Corp.,
842 F. Supp. 1321 (D. Kan. 1993) 8

In re Jensen, 995 F.2d 925 (9th Cir. 1993) 23

K.C. 1986 Ltd. Partnership v. Reade Mfg.,
33 F. Supp.2d 1143 (W.D. Mo. 1998) 23

Kelly v. E.I. DuPont De Nemours and Co.,
17 F.3d 836 (6th Cir. 1994) 17-19

Key Tronic Corp. v. United States,
511 U.S. 809 (1994) 11

Pinal Creek Group v. Newmont Mining Corp.,
118 F.3d 1298 (9th Cir. 1997) 11

RSR Corp. v. Avanti Dev., Inc.,
68 F. Supp. 2d 1037 (S.D. Ind. 1999) 25

Redwing Carriers, Inc. v. Saraland Apartments,
94 F.3d 1489 (11th Cir. 1996) 13, 25

Struhar v. City of Cleveland,
7 F. Supp. 2d 948 (N.D. Ohio 1998) 25

United States v. A&N Cleaners and Launderers, Inc.,
854 F. Supp. 229 (S.D.N.Y. 1994) 11-12

United States v. Bestfoods,
524 U.S. 51 (1998) 10-11, 13, 21-22

Page

United States v. Cello-Foil Prod., Inc.,
100 F.3d 1227 (6th Cir. 1996) 25

United States v. Navistar Int'l Transp. Corp.,
152 F.3d 702 (7th Cir. 1998) 16-17, 19

United States v. TIC Inv. Corp.,
68 F.3d 1082 (8th Cir. 1995) 13, 25

United States v. Vertac Chem. Corp.,
966 F. Supp. 1491 (E.D. Ark. 1997)..... 25-26

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

Comprehensive Environmental Response
Compensation and Liability Act
("CERCLA"), 42 U.S.C. §§ 9601 to 9675..... *passim*

42 U.S.C. § 9601
(CERCLA Section 101) 7, 21
42 U.S.C. § 9607
(CERCLA Section 107) ..... *passim*
42 U.S.C. § 9613(g)(2)
(CERCLA Section 113(g)(2))..... *passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 104-861, at 70 (1996).....12

Page

OTHER MATERIALS

Evan Bogart Westerfield,
When Less is More: A Significant Threat Threshold for CERCLA Liability, 60 U. CHI. L. REV. 697 (1993).....12

John T. Ronan III, *A Clean Sweep on Cleanup*, THE RECORDER, Sept. 30, 1992, at 10.....12

OFFICE OF TECHNOLOGY ASSESSMENT, ASSESSING CONTRACTOR USE IN SUPERFUND, *reprinted in* 1 CHEMICAL WASTE LITIG. REP. 715 (1989).....12

PETITION FOR A WRIT OF CERTIORARI

Petitioner ARCADIS Geraghty & Miller, Inc. ("G&M"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a-29a) is reported at 234 F.3d 917. The order of the Fifth Circuit denying the petition for rehearing (App., *infra*, 30a-31a) is not reported. The opinion of the District Court for the Southern District of Texas ("District Court") (App., *infra*, 32a - 47a) is reported at 27 F. Supp. 2d 918. The order of the District Court denying rehearing/new trial (App., *infra*, 48a-49a) is not reported.

JURISDICTION

The judgment of the Fifth Circuit was entered on December 14, 2000. The timely petition for rehearing was denied on January 11, 2001. This petition was filed within 90 days of January 11, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675, are 42 U.S.C. §§ 9607(a) and 9613(g)(2). App., *infra*, 50a-52a.

STATEMENT

This case derives from environmental investigation and remediation activities conducted at the Lake Charles Chemical Complex ("LCCC") located in Lake Charles, Louisiana. The LCCC's owners, respondents Conoco Inc. and Condea Vista Company, brought the claim under the CERCLA, 42 U.S.C. §§ 9601 to 9675, in an attempt to recover remedial costs from petitioner G&M, an environmental and engineering consultant hired by respondents to provide investigative services at the LCCC.

Respondent Condea Vista Company currently owns the LCCC and respondent Conoco Inc. is the site's former owner. Collectively, Conoco Inc. and Condea Vista Company have owned and operated the LCCC from 1961 to the present.[1] App., *infra*, at 2a.

Beginning in 1968, Conoco began managing, among other chemicals, ethylene dichloride ("EDC") at the LCCC. App., *infra*, at 34a. Over the course of Conoco's operations at the LCCC, EDC was released into the environment. *Id.* Consequently, EDC migrated into soil and groundwater, *id.*, causing severe environmental contamination.

In the early 1980s, the Louisiana Department of Environmental Quality ("LDEQ") issued an order requiring Conoco to investigate and address contamination at the LCCC. In connection with this process, Conoco and G&M executed a document entitled "Engineering Services

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[1] For clarity, respondents Conoco and Condea Vista are hereinafter referred to collectively as "Conoco."

Contract" ("Engineering Contract") on March 12, 1985. Under the terms of the Engineering Contract, G&M agreed to furnish to Conoco certain services required for a "Ground-Water Quality Assessment, Phase 2" at the LCCC. *Id.* at 2a-3a.

The Phase 2 assessment was aimed at assessing the extent and nature of groundwater contamination below a portion of the LCCC. G&M's contractual tasks included engineering design plans for installation of 50 groundwater wells used for monitoring possible contamination, installing the monitoring wells, and sampling the monitoring wells following installation. *Id.* at 3a. G&M completed installation of the monitoring wells on July 23, 1985. *Id.*

In 1985, Conoco began to suspect that the monitoring wells had technical and physical problems. Based on a consultant's recommendations, Conoco plugged and abandoned four of the wells in 1988 and 1989. *Id.* at 36a. According to Conoco, their experience plugging and abandoning the wells gave them reason to be concerned about the remaining wells that G&M had installed under the Engineering Contract. *Id.* In 1993, Conoco sued G&M in Texas state court alleging breach of contract and other state-law causes of action as a result of the allegedly defective wells. *Id.* at 5a.

On April 4, 1997, G&M sued Conoco in the District Court. G&M alleged claims under CERCLA for recovery of investigation costs related to Conoco's allegations that G&M exacerbated contamination at the LCCC. On June 24, 1997, Conoco filed a counterclaim which is the subject of this appeal. *Id.* at 37a. Among other claims, Conoco alleged that G&M was liable under CERCLA Section

107(a) (codified at 42 U.S.C. § 9607(a)) as an "operator" of a facility and an "arranger" of hazardous substances disposed at the LCCC. On December 2, 1997, Conoco sought leave to file an amended answer, through which Conoco attempted to combine the state and federal lawsuits by filing its state law causes of action as counterclaims. The District Court granted Conoco leave to file the amended answer on December 23, 1997. *Id.* at 3a. G&M subsequently dismissed its CERCLA claims pursuant to stipulation, leaving only Conoco's counterclaim for adjudication by the court. *Id.* at 5a.

On February 9, 1998 G&M filed a motion for partial summary judgment arguing that it was not liable under CERCLA as a matter of law. The District Court denied G&M's motion on June 2, 1998.

On September 14, 1998, G&M sought leave to file an additional motion for partial summary judgment. *Id.* at 5a. The proposed motion argued that Conoco's CERCLA counterclaims were barred by CERCLA's statute of limitations because Conoco filed them more than six years after the initiation of "physical on-site construction" of the remedial action at the LCCC. *See* CERCLA § 113(g)(2)(B) (codified at 42 U.S.C. § 9613(g)(2)(B)). On September 23, 1998, the District Court denied G&M leave to file the proposed motion.

When the parties appeared for trial on the scheduled date, the District Court discussed the case with counsel and suspended the start of the trial. App., *infra*, 5a. In October 1998, after reconsidering the arguments for summary judgment, the District Court granted summary judgment for G&M on all of Conoco's claims. *Id.* at 32a. In determining whether G&M was a liable "covered person"

(including an "arranger" or "operator") under CERCLA Section 107(a), the District Court analyzed the role that G&M played with regard to the LCCC. *Id.* at 45a-47a. In particular, the District Court noted that "G&M was merely an environmental contractor employed to investigate and assist in constructing a facility for remedying contamination already in the soils." *Id.* at 45a. The District Court also recognized that G&M was under Conoco's supervision and therefore, the type and location of the wells at issue were directed by Conoco and the state of Louisiana. *Id.* at 47a. The District Court further determined that G&M never intended to arrange for, manage or transport Conoco's hazardous waste. *Id.* As a result, the District Court concluded that G&M was not an "arranger" or "operator" (or for that matter "owner" or "transporter") for purposes of CERCLA Section 107(a). *Id.* at 45a, 47a.

With regard to the CERCLA statute of limitations, the District Court determined that Conoco initiated a "remedial action" in 1987 when Conoco hired I.T. Corporation to begin construction of a system for remediating groundwater. *Id.* at 46a. The District Court applied CERCLA Section 113(g)(2)(B), *id.*, which provides that an action must be brought "within 6 years after initiation of physical on-site construction of the remedial action . . . ." 42 U.S.C. § 9613(g)(2)(B). The District Court determined that since the "remedial action" was initiated in 1987, Conoco had until 1993 to bring its CERCLA suit. App., *infra*, 46a. Because Conoco first asserted its CERCLA counterclaim in 1997, Conoco's counterclaim was time barred. Conoco filed a motion for rehearing which was denied on December 3, 1998. *Id.* at 48a-49a.

Conoco appealed to the Fifth Circuit. Conoco raised several issues on appeal, including the District Court's finding that G&M was not an "operator" or "arranger" and that Conoco's counterclaim was barred by limitations. In G&M's Answering Brief, G&M argued that the statute of limitations had run because undisputed facts showed that remedial action began at the site more than six years before Conoco filed its counterclaim. In addition, G&M argued that it could not be an "operator" because undisputed facts showed it lacked control over activities relating to alleged disposal of hazardous waste. G&M further argued that it could not be an "arranger" because among other reasons, undisputed facts showed that G&M had no intent to dispose of hazardous substances.

The Fifth Circuit reversed with respect to the CERCLA issues and remanded to the District Court. *Id.* at 29a. With regard to the CERCLA statute of limitations, the Fifth Circuit agreed with G&M that CERCLA Section 113(g)(2) contained the applicable limitations period. *Id.* at 11a. The Fifth Circuit was then faced with determining whether CERCLA Section 113(g)(2)(A) or 113(g)(2)(B) applied. *Id.* at 12a. Section 113(g)(2)(A) includes a three-year limitations period triggered by completion of a "removal action." Section 113(g)(2)(B) includes a six-year limitations period triggered by on-site construction of a "remedial action." Accordingly, the Fifth Circuit needed to decide which type of response activity, "removal action" or "remedial action," occurred at the LCCC.

CERCLA Section 101 includes definitions for "removal" and "remedial action."[2] Although the definitions

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[2] 42 U.S.C. section 9601(23) defines "remove" or "removal" as follows:

> (23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.].

42 U.S.C. section 9601(24) defines "remedy" or "remedial action" as follows:

> (24) The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement,

are stated in general terms and overlap, courts have generally found that a "removal action" is a short-term cleanup measure. *See, e.g., Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986); *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*, 100 F.3d 792, 797 (10th Cir. 1996). On the other hand, a "remedial action" is typically a long-term measure aimed at achieving a permanent remedy. *See, e.g., Exxon,* 175 U.S. at 360. While the lines have often been blurred between the two types of actions, courts have uniformly determined that site investigation activities constitute removal actions. *See Greene v. Product Mfg. Corp.*, 842 F. Supp. 1321, 1325 n. 6 (D. Kan. 1993) (stating that courts agree that investigation and testing of groundwater constitute "removal" actions).

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perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

In order to determine whether actions at the LCCC were "removal" or "remedial," the Fifth Circuit had to determine which actions were relevant to the statute of limitations. Although the District Court considered response activities conducted by Conoco consultants after G&M completed its work, App., *infra*, 46a, the Fifth Circuit considered only those response activities that occurred during the time G&M was working at the site. As a result, the Fifth Circuit did not consider activities after 1985, when G&M completed installation of the monitoring wells.[3] Instead, the Fifth Circuit focused on G&M's installation of the monitoring wells and concluded that those activities were "removal" because they related to site investigation. *Id.* at 15a-17a. Consequently, the Fifth Circuit applied Section 113(g)(2)(A) and further determined that the statute of limitations had not run, thereby reversing the District Court's judgment and order.[4] *Id.* at 17a.

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[3] Although G&M continued to sample the monitoring wells for approximately a year after installation, the Fifth Circuit apparently did not find that 1985-1986 time period relevant. In any event, G&M asserts that the "remedial" action began in 1987, so that the 1985-1986 time period is of no consequence.

[4] The Fifth Circuit's focus on groundwater monitoring and investigation activities (i.e. monitoring well construction) and its disregard of later response activities allowed it to make an easy determination with respect to the type of response activity involved. As indicated earlier, courts uniformly hold that groundwater investigation and monitoring activities constitute "removal" action. *See supra* p. 8. Unfortunately, the court avoided the more difficult question of whether later response action activities constituted "removal" or "remedial" action.

In determining that summary judgment was not appropriate with regard to G&M's "operator" liability, the Fifth Circuit started its analysis with the definition of "operator." App., *infra*, 19a. Noting that the definition was of little use, the Fifth Circuit turned to the case law. *Id.* After citing the language in *United States v. Bestfoods*, 524 U.S. 51, 66 (1998), the Fifth Circuit stated that operator liability attaches only if there is a nexus between the alleged operator's control and the hazardous waste in the facility. *Id.* at 19a-20a. The court went on to state that the "totality of the circumstances" concerning a contractor's involvement must be considered in determining "operator" liability, *id.* at 20a, rather than focusing on the most relevant facts (*e.g.* the Engineering Contract, which sets forth that G&M was hired to assist clean up of the LCCC rather than operate the facility). Nonetheless, in the Fifth Circuit's view, disputed issues of material facts precluded summary judgment. *Id.* at 20a-21a.

With regard to "arranger" liability, the Fifth Circuit stated that "liability attaches when one has 'arranged for disposal' of hazardous substances." *Id.* at 21a. As mentioned earlier, G&M argued in its Answering Brief that intent is required to "arrange" and the District Court found that G&M could not be held responsible because G&M never intended to arrange for, manage or transport Conoco's hazardous waste. *See supra* pp. 5-6. Nonetheless, the Fifth Circuit did not address the intent issue. Rather, the court determined that there were material facts in dispute regarding whether, and how, the hazardous waste was moved by G&M. App., *infra*, 21a. Consequently, the court reversed and remanded without providing any guidance as to whether Conoco would be required to prove that G&M intended to dispose of hazardous substances.

G&M petitioned the Fifth Circuit for panel rehearing. The court denied G&M's petition on January 11, 2001. *Id.* at 48a-49a.

REASONS FOR GRANTING THE PETITION

CERCLA is an important statute creating a broad and pervasive strict liability scheme. Incorrect and inconsistent judicial interpretation affecting the scope of liability and limitations may have profound consequences to litigants nationwide.

In 1980, Congress enacted CERCLA in response to the serious environmental and health risks posed by industrial pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (citing *Exxon Corp. v. Hunt*, 475 U.S. 355, 358-59 (1986)). "As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Id.* (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994)). CERCLA also authorizes suits by private parties to obtain contribution or recover costs expended in cleaning up hazardous waste sites. *See, e.g., ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 355 (2d Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997).

While CERCLA's social and economic impact may have been significant even at its inception, it is apparent that CERCLA's effect has become tantamount over the years. At one time it was estimated that between 130,000 and 380,000 sites were potential candidates for CERCLA government-initiated response action. *See United States v.*

A&N Cleaners and Launderers, Inc., 854 F. Supp. 229, 236 (S.D.N.Y. 1994) (citing Evan Bogart Westerfield, *When Less is More: A Significant Threat Threshold for CERCLA Liability*, 60 U. CHI. L. REV. 697, 697 n. 4 (1993)). Along with the large number of sites comes a large number of litigants. A 1996 House Report cites EPA statistics that demonstrate that there are between 80,000 and 100,000 parties involved in the CERCLA liability system. H.R. Rep. No. 104-861, at 70 (1996). Moreover, estimates of costs are staggering. Estimates of CERCLA cleanup costs range in the several hundreds of billions of dollars with an estimate as high as $750 billion. *See A & N Cleaners*, 854 F. Supp. at 236 (citing John T. Ronan III, *A Clean Sweep on Cleanup*, THE RECORDER, Sept. 30, 1992, at 10; OFFICE OF TECHNOLOGY ASSESSMENT, ASSESSING CONTRACTOR USE IN SUPERFUND, *reprinted in* 1 CHEMICAL WASTE LITIG. REP. 715 (1989)).

Thus, CERCLA carries significant weight from an economic perspective and it affects a broad base of the American public. To ensure that CERCLA does not overreach (or fail to reach) its intended bounds, courts should give thoughtful consideration to issues relating to liability. This case offers the Supreme Court an opportunity to give guidance and resolve divergent decisions of the United States Courts of Appeals with regard to three such issues.

In particular, the Supreme Court should resolve the proper application of the CERCLA Section 113(g)(2) statute of limitations. *See* 42 U.S.C. § 9613(g)(2). By creating a rule of law that erroneously takes a narrow view of what activities trigger the statute of limitations, the Fifth Circuit severely limited the statute's intended effect. Prompt review by this Court would ensure that the

uncertainty engendered by the Fifth Circuit's ruling does not lead lower courts astray. Moreover, this Court's review would provide notice to potential CERCLA litigants that might otherwise delay filing claims in reliance upon the Fifth Circuit's narrow interpretation of the statute of limitations.

In addition, this case provides the Court with an opportunity to properly delimit the scope of the "operator" provision of CERCLA Section 107(a)(1) and (2) to ensure that environmental contractors, like G&M, are not discouraged from participating in response activities because of the threat of strict liability under CERCLA for the consequences of pre-existing contamination. *See* 42 U.S.C. § 9607(a)(1) & (2). While the environmental contractor's role does not fit within the ordinary meaning of "operator" as interpreted by this Court in *United States v. Bestfoods*, 524 U.S. 51 (1998), the Fifth Circuit's broad view of that term threatens to undermine the remedial goals of Congress by holding environmental contractors strictly liable for the results of contaminating activities that occurred years before the contractor's involvement at the site.

Likewise, this Court may put an end to the misapplication of the "arranger" liability provision of CERCLA Section 107(a)(3). *See* 42 U.S.C. § 9607(a)(3). Over the years, some courts have twisted the phrase "arranged for disposal" to include unintentional disposal. *See, e.g., United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995) (stating that "arranger" liability does not require specific intent); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1512 (11th Cir. 1996). This faulty interpretation invites CERCLA plaintiffs to name defendants that are beyond the scope of the CERCLA

liability scheme as intended by Congress. *See, e.g., Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (CERCLA plaintiff argued that the supplier of useful product that hired a transporter to deliver that product had "arranged for disposal" when the useful product accidentally spilled on the ground during unloading from the transporter's truck). This Court may now properly limit "arranger" liability to those who had an intent to dispose. Such a ruling would help ensure that CERCLA liability is not extended beyond Congress's original intent.

I. In Contrast to the Holdings of the Other Circuits, the Fifth Circuit Incorrectly Focused Only on Activities Conducted During G&M's Response Action Involvement Rather Than Looking at the Totality of On-Site Response Activity When Determining the Response Action That Triggered the CERCLA Section 113(g)(2) Statute of Limitations.

The statute of limitations set forth at Section 113(g)(2) of CERCLA begins to run upon the triggering of one of two events. Section 113(g)(2) of CERCLA states:

> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced -
> (A) for a removal action, within 3 years after completion of the removal action . . . and;
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . .

42 U.S.C. § 9613(g)(2). Faced with the issue of whether to apply the three-year statute of limitations of Section

113(g)(2)(A) or the six-year statute of limitations of Section 113(g)(2)(B), the Fifth Circuit correctly turned to the issue of whether the response activities at the site were "removal" or "remedial." App., *infra*, 12a. However, in making its determination, the court did not consider all the relevant response activities. Instead, the court only considered response activities that were contemporaneous with G&M's involvement with the site.[5] *Id.* at 16a.

As a result, the Fifth Circuit ignored all response activities except those that were conducted when G&M performed well installation work, which ended in July 1985. The court stated that "the crucial response activity is that which occurred during G&M's involvement" and that "no permanent remedy was in place . . . when G&M constructed and installed the wells." *Id.* Given the Fifth Circuit's temporal limitation, the court focused on G&M's installation of monitoring wells as the relevant response activity and concluded that "[e]ven if the replacements for these wells are integral to the long-term remediation of the site, that does not mean that their initial placement cannot be categorized as removal." *Id.* at 17a. Recognizing that "removal" actions are "short-term" response activities and that the installation of monitoring wells for the purpose of initial site investigation falls within that category, the Fifth Circuit incorrectly concluded that the activities relevant to triggering the statute of limitations were "removal" in nature. *Id.* at 15a-17a. The Fifth Circuit's failure to consider response activities conducted after July 1985 erroneously resulted in the court ignoring Conoco's remedial "tank farm program" which began in

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[5] As indicated earlier, the Fifth Circuit appeared to disregard G&M's limited involvement after the installation of the wells.

approximately 1988, *id.* at 38a and 46a, and lasted for over ten years.

The Fifth Circuit's application of the statute of limitations is illogical and is inconsistent with decisions from other federal circuits and district courts. The court of appeals failed to explain why the time period during G&M's involvement is the only time period that could include response activities relevant to determining when the statute of limitations is triggered. The language of the CERCLA Section 113(g)(2) statute of limitations provides no basis for the Fifth Circuit's interpretation. The statute does not specify who must perform the response action; nor does the statute specify when the response action must be performed in relation to the defendant's on-site activities. Nonetheless, the Fifth Circuit concluded that the only activities that could trigger the statute of limitations are those actions that occurred during G&M's involvement.

G&M is aware of no other federal court decision holding that the only response activities that trigger the statute of limitations must take place during the time-frame for which the defendant was involved with the site. In fact, other courts have reached the opposite conclusion. For example, the Seventh Circuit determined that a CERCLA action was barred by the statute of limitations without giving any consideration to whether the triggering response activity occurred when the defendant was or was not involved with the site. *See United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702 (7th Cir. 1998). In *Navistar*, the Seventh Circuit decided whether the government's CERCLA action against Navistar, a party associated with contamination at the site, was timely. *Id.* at 706-07. According to the court, Navistar demonstrated that the site owner began construction of a clay cap at the site more than

six years before the government filed its CERCLA action. *Id.* at 713. Because the *site owner's* response activity constituted "on site construction of the remedial action," the court held that Section 113(g)(2) barred the action. *Id.* However, unlike the Fifth Circuit in the present case, the *Navistar* court did not even consider when Navistar's involvement with the site took place. Rather than focusing on the defendant's involvement, the Seventh Circuit looked at the totality of response activity at the site as a whole and determined that the site owner's activity constituted the remedial action that triggered the statute of limitations.

The Fifth Circuit's overly narrow view of response activities that may trigger the statute of limitations also conflicts with the Sixth Circuit's analysis in *Kelly v. E.I. DuPont De Nemours and Co.*, 17 F.3d 836 (6th Cir. 1994). In *Kelly*, the state of Michigan sued E.I. DuPont De Nemours and Co. ("DuPont") for response costs necessary to clean up a landfill site owned by a third party. DuPont had disposed of industrial waste in the landfill over a ten-year period beginning in 1955. It was not until the 1980s that the Michigan Department of Natural Resources ("MDNR") hired contractors to perform a removal action. In 1986, one phase of the removal action was complete (the "1986 Phase"). Additional removal activities were performed at least through 1988.

In 1990, MDNR sued DuPont under CERCLA to recover the cost of the clean up efforts. Based on the three-year statute of limitations of Section 113(g)(2)(A), DuPont asserted that MDNR's claim for recovery of costs associated with the 1986 Phase was time barred. The Sixth Circuit disagreed, reasoning that the 1986 Phase removal activities were part of the same removal action that encompassed later removal activities. *See id.* at 843-44.

Implicitly, the Sixth Circuit rejected any notion that the time period during DuPont's involvement was the only time period that could include response activities relevant to determining when the statute of limitations was triggered. In determining that MDNR's CERCLA action was not time barred, the Sixth Circuit looked at response activities that occurred after the defendant's (DuPont's) involvement. *See id.* To apply the Fifth Circuit's requirement — that the only response actions relevant in determining when the statute of limitations triggers are response actions that occurred during the defendant's involvement with the site — would lead to an absurd result in *Kelly* because *no response activities at all* occurred during the defendant's involvement. Thus, the statute of limitations would never run because there would never be a triggering response action.

By limiting its focus to activities that occurred during G&M's involvement, the Fifth Circuit's analysis results in the anomalous conclusion that the statute of limitations is *never* triggered on Conoco's claim. If the only events that are relevant occurred during G&M's involvement, and that time-frame included neither the commencement of remedial action nor the conclusion of removal action, then the triggers of Section 113(g)(2) and (3) are each eliminated -- leaving no possible trigger at all. Accordingly, under the Fifth Circuit's holding, nothing is to prevent Conoco from filing a lawsuit now or at anytime in the future against G&M for the claims alleged in the underlying suit. The fact that Congress provided a statute of limitations in Section 113 indicates that Congress did not intend to create a cause of action without temporal limitation.

It is apparent that the Fifth Circuit struggled to apply the statute of limitations in this unusual case involving an environmental contractor hired to work on a site that was already contaminated. However, it does not follow that because G&M was involved in the response activities, that the only response activities relevant in determining when the statute of limitations is triggered are those that occurred during G&M's involvement. Certainly, response activities after G&M's involvement could be relevant in triggering the statute of limitations, just as activities occurring after the defendant's involvement were relevant in *Navistar* and *Kelly*.

In particular, undisputed evidence shows that the tank farm program, which was initiated in approximately 1988, about three years after G&M finished its work, was aimed at permanently remediating the site. App., *infra*, 38a and 46a. The program lasted over ten years and recovered nine million gallons of water containing 16 thousand pounds of contaminants, yet the Fifth Circuit failed even to consider the program as a relevant response activity for purposes of determining the triggering of the statute of limitations. A proper analysis of the tank farm program would have revealed that it was a long-term action that was intended to permanently clean up the groundwater. Consequently, the tank farm program was "remedial" in nature and, therefore, the six-year statute of limitations of Section 113(g)(2)(B) was triggered in approximately 1988. Conoco's CERCLA counterclaim was filed in 1997, at least three years after the 1994 deadline.

The Fifth Circuit's newly found temporal limitation concerning the removal or remedial action in Section 113(g)(2) introduces new uncertainty into the issue of timelines under CERCLA. Now, lower courts looking to

the Fifth Circuit for precedent must apply an additional court-imposed rule, not expressed in the Section 113(g)(2), when determining when the statute of limitations is triggered. Such a requirement undermines the very purpose of a statute of limitations — to provide certainty regarding when a claim becomes stale.

II. This Court Should Make Clear that "Operator" Liability Does Not Extend to Environmental Contractors that, Like G&M, Participated in Response Activities at an Already-Contaminated Site at the Direction of the Site Owner.

In its motion for summary judgment, G&M argued that it was not an operator because, as a contractor engaged to provide environmental services, it did not have the authority to implement any of its recommendations without approval from Conoco. The District Court agreed with G&M because it found that G&M's contractual role was limited to investigation and assistance in Conoco's clean up activities. App., *infra*, 45a. However, the Fifth Circuit found the District Court's conclusion premature, on the grounds that material issues of fact existed with regard to the nature and extent G&M's control over its activities at the LCCC. *Id.* at 20a-21a. By remanding for factual findings regarding control, the Fifth Circuit failed to recognize that extending "operator" liability to environmental contractors does violence to the meaning of "operator" as interpreted by this Court and distorts the liability scheme envisioned by Congress.

CERCLA Section 107 lists four classes of persons that can be held liable for clean-up costs associated with a CERCLA site: site "owners," "operators," "arrangers," and

"transporters." CERCLA Section 107(a)(1) and (2) establish liability for:

> (1) the . . . operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance . . . operated any facility at which such hazardous substances were disposed of. . . .

42 U.S.C. § 9607(a). CERCLA Section 101(20)(A) defines "operator" in a circular manner, as "any person . . . operating . . . a facility." *See* 42 U.S.C. § 9601(20)(A); *see also United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (recognizing that the definition is a tautology).

In *Bestfoods*, this Court recently provided guidance to flesh out the "ordinary and natural meaning" of "operator:"

> [A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66.

In the present case, it is clear that the Engineering Contract did not cause G&M to become an "operator" of the LCCC within the "ordinary and natural meaning" of the term as interpreted by this Court in *Bestfoods*. G&M merely acted as a contractor engaged by Conoco to participate in remedial investigation. G&M's contractually-prescribed role was limited to mere design and placement of wells; the contract did not allow G&M to "manage, direct, or conduct operations" of the facility. In short, G&M was hired to help remediate the facility rather than operate it.

The District Court recognized the limitations of G&M's contractual role, concluding that "G&M was merely an environmental contractor employed to investigate and assist in constructing a facility for remedying contamination already in the soils." App., *infra*, 45a. Because the purpose and extent of G&M's participation is discernable from the Engineering Contract, no additional facts were necessary for the District Court to conclude that G&M was not an operator as a matter of law.

The District Court is not alone in its rationale. In *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 96 F. Supp.2d 1375 (S.D. Fla. 2000), the owner of a contaminated site sued an environmental engineering firm that had provided services in connection with remediating the site. Bringing claims similar to Conoco's allegations against G&M, the owner claimed that the engineering firm was an operator as a result of its remediation work. After analyzing the contractor's liability in terms of this Court's "operator" discussion in *Bestfoods*, the court concluded that "engaging in clean-up activities at a facility does not qualify as the type of 'operation' CERCLA contemplates."

Id. at 1379. Consequently, the court held that the engineering firm was not a CERCLA operator.

In contrast to the sound reasoning of *Blasland* and the District Court in this case, other courts have adopted an analysis mirroring the Fifth Circuit's approach. *See, e.g., K.C. 1986 Ltd. Partnership v. Reade Mfg.*, 33 F. Supp.2d 1143, 1148 (W.D. Mo. 1998); *Ganton Technologies, Inc. v. Quadion Corp.* 834 F. Supp. 1018, 1022 (N.D. Ill. 1993). These courts have erroneously stretched the concept of "operator" to include contractors engaged in clean up of contaminated sites.

Intervention by this Court is critical to restore the scope of "operator" liability to effectuate the intent of Congress while protecting CERCLA's central objective: the prompt remediation of contaminated sites. *See In re Jensen*, 995 F.2d 925, 927 (9th Cir. 1993). Pinning the liability for contamination upon environmental contractors as "operators" only defeats CERCLA's mandate. Such an interpretation would have a chilling effect on the environmental remediation industry causing further delay in the remediation process.

III. This Court Should Decide Whether Intent Is an Element of "Arranger" Liability Because the Fifth Circuit Failed to Resolve the Issue Despite Its Dispositive Importance on Remand and the Clear Conflict of Circuit Court Decisions on the Issue.

The third of the four classes of persons that can be held liable under CERCLA Section 107(a) consist of those who "arranged for disposal" of hazardous substances,

commonly known as "arrangers." CERCLA Section 107(a)(3) establishes "arranger" liability for:

> [A]ny person who by contract, agreement, or otherwise *arranged for disposal* or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . .

42 U.S.C. § 9607(a) (emphasis added).

In the present case, Conoco alleged that G&M was an "arranger" because the Engineering Contract was an "arrangement" and that G&M's performance under the contract allegedly resulted in "disposal" of hazardous substances. According to Conoco, "disposal" occurred when contaminants already in the groundwater leaked deeper into the ground through the monitoring wells that G&M designed pursuant to the Engineering Contract. It is beyond dispute that the Engineering Contract does not contemplate any intent to cause contaminants to migrate deeper into the ground. Accordingly, whether Section 107(a)(3) requires "intent to dispose" is a dispositive issue with respect to Conoco's "arranger" claim.

A. The Courts of Appeals Have Issued Conflicting Rulings on Whether CERCLA Requires "Intent to Dispose" as an Element of "Arranger" Liability.

The issue of whether intent to enter into an arrangement for disposal is a requisite element of "arranger" liability is an exceptionally controversial issue among the Courts of Appeals. The Sixth and Seventh Circuits have held that there is an intent or "state of mind" requirement implicit in the "arranged for disposal" language of CERCLA Section 107(a)(3). *See United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231-32 (6th Cir. 1996); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993); *see also Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 845 (6th Cir. 1999); *RSR Corp. v. Avanti Dev., Inc.*, 68 F. Supp.2d 1037, 1043-44 (S.D. Ind. 1999); *Struhar v. City of Cleveland*, 7 F. Supp.2d 948, 952 (N.D. Ohio 1998). Likewise, the District of Utah has interpreted Section 107(a)(3) to require intent. *See Ekotech Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1336 (D. Utah 1996). On the other hand, the Eighth and Eleventh Circuits have expressly stated that specific intent to dispose is not a requirement for "arranger" liability. *See United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1512 (11th Cir. 1996).[6] Several district courts have also stated that specific intent to dispose is not required. *See United States v. Vertac Chem. Corp.*, 966 F.

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[6] Although *Redwing* does not condition arranger liability on intent to dispose, it includes intent among the factors bearing on whether there is a "nexus" between the defendant and the disposal sufficient to result in arranger liability. *See Redwing*, 94 F.3d at 1512.

Supp. 1491, 1501 (E.D. Ark. 1997); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1138-40 (N.D. Fla. 1994).

Because several circuits have addressed the issue of whether intent is a prerequisite to "arranger" liability, the key points for both positions are fully developed and sharpened for resolution for this Court. Now that the issue has matured, this case offers this Court the opportunity to put an end to the troubling inconsistency in this area of CERCLA. A clear ruling by the Court requiring intent as a necessary element of "arranger" liability would correctly delimit the scope of "arranger" liability, leading to a more manageable and fair liability scheme that coincides with Congressional intent.

Such a ruling would eliminate arguments such as the one in *Amcast*, where a CERCLA plaintiff claimed that the supplier of a useful chemical that hired a transporter to deliver the product had "arranged for disposal" when the chemical accidentally spilled on the ground during the unloading from the transporter's truck. *See Amcast*, 2 F.2d at 751. Clearly, labeling the chemical supplier as an "arranger" in that context is a stretch of Section 107(a)(3). For these reasons, it is imperative that this Court end the irreconcilable split among the circuits with regard to "arranger" liability.

B. The Fifth Circuit's Failure to Address the Issue of Whether Intent Is an Element of "Arranger" Liability, in Light of the Fact That the District Court Based Its Holding on Lack of Intent Leaves the District Court, and Other Courts, With Insufficient Direction.

The District Court concluded that "[t]he evidence clearly establishes that G&M did not operate, *arrange for*, or transport hazardous substances." App., *infra*, 45a (emphasis added). The District Court reasoned that "the problem of migration of [Conoco's] hazardous waste cannot be laid at the feet of G&M, because it was never the *intent* of G&M or [Conoco] that G&M arrange for, manage or transport [Conoco's] hazardous waste." *Id.* at 47a (emphasis added). Accordingly, the District Court granted summary judgment based, in part, on Conoco's failure to show that G&M intended to dispose of hazardous substances. *Id.*

Despite the fact that the District Court expressly grounded its arranger liability ruling on Conoco's failure to show any "intent to dispose," the Fifth Circuit seemed to avoid the issue even as it reversed and remanded. The court first focused on disposal and stated that the movement of hazardous substances around an already-contaminated site could constitute disposal. *Id.* at 21a. The court then identified a factual dispute regarding if and how the hazardous substances were moved and whether installation of the wells caused contaminant migration. *Id.* Based on these factual disputes, the Fifth Circuit rejected the District Court's grant of summary judgment, *id.*, even though the disputed issues had no bearing on whether G&M had the intent to dispose.

As a result, the Fifth Circuit's analysis of "arranger" liability fails to provide the District Court with the necessary guidance on whether Conoco must prove that G&M intended to dispose of hazardous substances. The Fifth Circuit's "arranger" analysis continued by citing *Burlington Northern Railroad Co. v. Woods Industries, Inc.*, 815 F. Supp. 1384, 1392 (E.D. Wash. 1993), for the proposition that if facts revealed that the defendant gave instructions to a third party which caused the dispersal of waste, the defendant would be subject to "arranger" liability. *Id.* at 21a-22a. The court instructed the District Court that there must be a nexus, presumably between the purported "arranger" and the disposal, before liability can attach. *Id.* at 22a. The court concluded that on remand, "the totality of the circumstances must take into consideration each of these factors." *Id.* It is unclear to what factors the Fifth Circuit was referring.

The Fifth Circuit's failure to give guidance to the District Court regarding intent provides this Court with the opportunity to resolve the inter-circuit split while encouraging a decisive result in this case which avoids relitigation of the "intent" issue and possible future appeals. The District Court specifically held that G&M could not be liable for Conoco's contaminant migration problem because it lacked the intent to "arrange for, manage or transport Conoco/Condea's hazardous waste." *Id.* at 47a. The Engineering Services Contract clearly does not contemplate an "intent to dispose" of hazardous substances down the well. Disputed facts identified by the Fifth Circuit, regarding if and how hazardous waste was moved, do not bear on whether G&M had the intent to dispose. Accordingly, the Fifth Circuit should have ruled in favor of G&M as a matter of law or at least given the District Court

guidance on whether intent was an element of "arranger" liability.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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